



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

March 29, 1999

Minutes of the March 10, 1999, meeting of the Commission on Governmental Ethics and Election Practices held in the First Floor Hearing Room, PUC Building, 242 State Street, Augusta, Maine.

Present: Chairman Peter B. Webster; Members Linda W. Cronkhite, Harriet P. Henry (telephonically), G. Calvin Mackenzie, and Merle R. Nelson; Director William C. Hain, III; Counsel Phyllis Gardiner; and Commission Assistant Diana True.

Chairman Webster called the meeting to order at 9:01 a.m.

In consideration of the Commission's practice of addressing agenda items out of order to accommodate the attendance of public participants regarding particular items, the Commission considered the published agenda as follows:

Agenda Item #3A: Cumberland County Republican Committee Late Election Campaign Finance Report: Lyle B. Cramer, Treasurer, appeared on behalf of the Party Committee requesting a determination of appropriate response by the Commission. In addition to the contents of his letter dated February 9, 1999, Mr. Cramer stated that the State Party Committee had not notified the Cumberland County Committee of the reporting requirements, that the Cumberland County Committee previously had filed voluntarily, and that he had not noticed the reference to the October 27 filing date on those previously filed reports. Mrs. Nelson moved, Mr. Mackenzie seconded, and the Members voted unanimously to accept the staff recommendation and assess a \$250 penalty, mitigating the statutory maximum by 50% in recognition of no previous filing violations.

Agenda Item #4: Patricia A. Peard, Esq. and Christine Young Complaint/Inquiry Regarding the Christian Civic League of Maine and the Christian Coalition of Maine: The Commission considered correspondence submitted by and accepted oral presentations by Attorney Peard on behalf of herself; Stephen C. Whiting, Esq., on behalf of the Christian Civic League of Maine; James Bopp, Jr., Esq. on behalf of the Christian Coalition of Maine; Gordon H. S. Scott, Esq., on behalf of the Maine Civil Liberties Union; and Ronald A. Kreisman, Esq., on behalf of the Family Planning Association of Maine. The Commission also had received and considered correspondence from Ms. Allie Stickney, Executive Director, Planned Parenthood of Northern New England. Ms. Young was not present, and no one came forward on her behalf when offered the opportunity to do so.

Before receiving the oral presentations of the individuals indicated, Chairman Webster announced that he had served with Attorney Peard on the Board of Trustees of the Client Protection Fund that reviews alleged attorney misconduct. Mrs. Nelson indicated that Attorney Peard and Mrs. Nelson's husband are partners in the same law firm, but that since Attorney Peard



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is not representing any of that firm's clients in the instant matter Mrs. Nelson did not believe the partnership relationship presented a conflict of interest in this situation.

Attorney Peard informed the Commission that she had used her law firm's stationery as a matter of convenience, and that she was not representing any clients in the instant matter, speaking instead solely on her own behalf. She particularly emphasized that she was not representing the group, "Maine Won't Discriminate," as she stated had been suggested in correspondence to the Commission.

Judge Henry indicated that she had made contributions to two of the organizations who had written letters to the Commission, but are not direct participants in the instant matter.

In response to the opportunity to do so, none of the participants objected to Chairman Webster's, Mrs. Nelson's, or Judge Henry's participation in the proceedings. Chairman Webster indicated that he was confident of the ability of all Commission Members to exercise their independent professional judgment in the matter.

Mr. Hain set forth the substance of the matters before the Commission, citing two separate communications. The first was a complaint submitted by Patricia A. Peard, Esq., against the Christian Coalition of Maine and the Maine Christian Civic League alleging the failure of the unregistered groups to register as political action committees (PACs); and a violation of the reporting requirements by the two registered PACs, "Yes For Equal Rights" and the "Ad Hoc Committee For Common Sense." The second was an inquiry submitted by Ms. Christine Young questioning whether the Christian Civic League of Maine and/or the Christian Coalition should be registered as political action committees (PACs) based on the solicitation of contributions and spending of money to influence particular campaigns, initiatives and referenda. Mr. Hain then set forth the statutory basis for the questions before the Commission, citing the provisions of 21-A MRSA section 1052(5)(A) and the definition of "political action committee" as the central issue before the Commission.

Attorney Peard addressed the Commission first, indicating that she did not know whether subparagraph 3 of the PAC definition was implicated in this matter, her question relating instead primarily to subparagraph 4, based on the need to know how the Commission intends to interpret that provision for the purpose of advising prospective clients. She indicated that, looking at the two PACs ("Yes for Equal Rights" and the "Ad Hoc Committee For Common Sense"), neither could have operated in any way without substantial "in-kind" contributions from the Christian Civic League and the Christian Coalition of Maine. Both organizations, she stated, expressly solicited contributions regarding the "People's Veto." She stated the issue as whether it is permissible for that practice to take place. She indicated that the end result was that in a major campaign, there was no reporting of individuals who contributed over \$100,000 through the Christian Civic League and the Christian Coalition of Maine. She suggested that it may be sufficient to know that the PACs were funded by the Christian Civic League and the Christian

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Coalition and not need to know the original sources of the funds received by either of those organizations. She questioned when an organization may explicitly go out and raise money to support or defeat a referendum without having to register as a political action committee.

Mr. Mackenzie questioned whether the threshold is crossed when an organization expressly solicits funds to influence the political process and how one would know when that line is crossed, suggesting that the answer may be when an organization expressly states that its solicitation is expressly intended to influence a specific question. He also questioned whether the term "solicit funds" should be read separately from "spend."

Judge Henry questioned how the solicitation and spending of funds affected the tax exempt status of an organization, to which Attorney Peard responded that it was not her intent to raise First Amendment Constitutional implications or the effect of conduct on the tax status of an organization, and that she had no personal information to offer regarding the tax status of any of the organizations here, assuming that they were abiding by the tax laws.

Attorney Whiting's presentation followed. He indicated his interpretation that the statute requires that money be solicited for express political purposes and spent for express purposes. He offered his experience regarding how the PACs in this matter were set up to keep solicitations and expenditures "inside the PACs." He acknowledged that the Christian Civic League makes many solicitations, and that the letters to the Commission (particularly Ms. Young's) presented only a very small number that are specifically for referendum drives. He questioned whether organizations are required to report only earmarked funds or all funds. He questioned the application of the penalty provisions in this case to a matter that occurred over 13 months ago, and repeated the assertion that the Christian Civic League had been led to believe by the Commission staff that they were doing what they were supposed to do. He acknowledged that the League had made 1 or 2 mistakes that should be overlooked as "de minimis" in comparison with all solicitations and expenditures by the League.

Chairman Webster questioned whether it is Attorney Whiting's belief that the League did not expend over \$1,500 in pursuit of the "People's Veto," other than contributions to PACs, that every penny spent had been reported as in-kind contributions to PACs. He further inquired of Attorney Whiting, when talking about in-kind contributions, does he mean services, equipment, etc., not cash money, even though the value of those contributions would be reported in dollars. Finally, he questioned whether the concept of "equitable estoppel" was not more properly a contract issue to be asserted between private, not applicable to a government agency's advice to an organization, to which Attorney Whiting responded that the theory of "equitable estoppel" recently has been applied to actions of governmental agencies by the Maine Supreme Judicial Court, referring to cases cited in his letter to the Commission.

Judge Henry noted item number 3 on page 2 of materials submitted as referring to "signature gatherers paid," and questioned how that had been reported -- as a cash or an in-kind

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contribution. Attorney Whiting responded that it could have been reported either way, that it does not matter in that case, so long as it is reported.

Mrs. Nelson noted item number 4 on page 3 of materials submitted as referring to contributions received marked "people's veto," to which Attorney Whiting responded that he believed that those contributions had been cashed and paid over to the indicated PACs based on the memo notation on the contribution document.

Mrs. Cronkhite noted item number 2 on page 4 of materials submitted as referring to the term "spend." Counsel Gardiner questioned whether, if the Christian Civic League collected checks designated "people's veto," and paid them over to the PACs, would that not make the Christian Civic League a "funding and transfer mechanism" as referred to in subparagraph 2 of section 1052(5)(A).

Mrs. Nelson inquired about Attorney Whiting's reference to "mistakes" and "slip ups" in reference to the apparently unintentional solicitations and expenditures that have been suggested, indicating that those are the reasons the organizations are before the Commission in response to the questions raised. Attorney Whiting indicated in response that roughly \$6,000 in checks marked "people's veto," less than one dozen of which were in amounts over \$50, had been received by the League and paid over to the PACs.

Attorney Bopp addressed the Commission on behalf of the Christian Coalition of Maine, requesting dismissal of the complaint against the Coalition. He stated that the issues before the Commission are important because they directly affect citizens rights to speak out on public issues. Noting that First Amendment concerns are properly before the Commission in its determination of the applicable statute, even though the Commission's role does not include Constitutional determinations, he suggested that the Commission should take the First Amendment into account in interpreting the statute in this case. He noted, for example, the Commission's having narrowly defined "express advocacy" in accordance with First Circuit and Supreme Court cases. He proposed that the Commission can make Constitutional determinations to avoid Constitutional conflicts.

Attorney Bopp then reiterated the Christian Coalition's efforts to comply with the Commission's requirements, indicating the procedure Mr. Paul Volle had followed in establishing the referendum PACs and the reporting of all contributions and expenditures to and by them, including communicating with the Commission's staff. He indicated that the Coalition had been advised that it could make either cash or in-kind contributions to PACs without itself becoming a PAC. He also noted that the Commission has a degree of "prosecutorial discretion" in determining what action to take in a given matter. He also noted that Attorney Peard chose to file a complaint instead of requesting an advisory opinion from the Commission.

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In reference to the statute at issue, Attorney Bopp noted that the Christian Coalition of Maine made no expenditures that were not reported as cash or in-kind contributions and, therefore, subparagraph 3 would not be applicable. Regarding subparagraph 4, he suggested that it should be interpreted in accordance with the plain meaning of the statutory language to avoid a Constitutional question. Regarding solicitations, he stated that the Christian Coalition of Maine made no solicitations regarding the "people's veto," noting that Ms. Young's documentation referred to communications exclusively initiated by the Christian Civic League. He further suggested that the term "spend" should be equated with "expend" and that such reference should be for the purpose of "expressly advocating a political issue." In that regard, the Coalition had made no "expenditures" regarding the "people's veto."

Attorney Bopp also raised the "major purpose test" (of *Buckley v. Valeo* and *FEC v. MCFL*) as the standard that the Commission should apply in this case, suggesting that the Commission may decide to recommend that the statute be amended to reflect the "major purpose test" as the appropriate standard for application of the PAC definition. The purpose of applying that standard would be to: 1) eliminate those groups whose "major purpose" is not "express advocacy" from the registration and reporting requirements of PACs, and 2) protect contributors to such organizations, thereby protecting their Constitutional freedom of association and avoiding harassment. He suggested further that an overly expansive interpretation of the definition of a PAC would open the Commission to a larger group of entities than the Legislature may have contemplated being required to register and file.

Mr. Mackenzie questioned whether even cash contributions from the Coalition to a PAC would not be a problem, to which Attorney Bopp responded that the so-called "middle man" (i.e., funding and transfer mechanism serving as conduit, acting as PAC, therefore must register and report as PAC) contemplated by subparagraph 2 would be a problem, but that the Commission must balance the interests involved. He suggested that the phrase "serves as a funding and transfer mechanism" is a description of the purpose of the entity and should have the "major purpose test" incorporated therein.

Mr. Mackenzie inquired as to what prevents subparagraph 2 from becoming a major loophole by permitting large amounts of money to pass through one entity into another, thereby avoiding the registration and reporting requirements that are important to public disclosure, to which Attorney Bopp responded that the First Amendment is not a "loophole." Mr. Mackenzie asked Attorney Bopp what is the major purpose of the Christian Coalition of Maine, to which Attorney Bopp responded that the purpose is ongoing and that there is no dispute that the major purpose of the Coalition is not the passage or defeat of any particular referendum; that, by any test (purpose or expenditures), the function is not to expressly advocate on any particular political question.

At 11:00 a.m., the Chairman then declared a 10-minute recess, reconvening at 11:10 a.m.

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In response to Mrs. Cronkhite's questions about the nature and functions of the Coalition, Attorney Bopp responded that he was not sure what was meant in this context by the term "political." He stated that the "major purpose test" is not applicable to only political activity, but rather the test applies to whether the major purpose of an organization is to "expressly advocate" regarding a political question.

Mr. Mackenzie inquired of Attorney Peard, noting that Attorney Bopp had stated that the Christian Coalition of Maine had not solicited or expended funds expressly advocating a position regarding the "people's veto," whether she possessed any evidence to the contrary. Attorney Peard responded that she believed that she had a good faith basis to include the Coalition in her letter based on the inferences that could be drawn from the mention of the Coalition in the materials from the Christian Civic League's web site, although she did not have specific evidence of any such solicitations or expenditures.

Mr. Mackenzie then moved, and Judge Henry seconded, to dismiss the complaint against the Christian Coalition of Maine, based on the absence in the record of information showing that the Coalition engaged in direct solicitation of contributions or violated the law by having failed to register as a PAC pursuant to 21-A MRSA section 1052(5)(A)(4), as alleged in the complaint submitted by Attorney Peard.

Mrs. Nelson inquired, if the complaint is dismissed against the Coalition, whether it could be brought again if new information is provided that would suggest a statutory violation, to which Chairman Webster responded that the Commission would not be barred from considering the matter again based on new information or other facts.

Further discussion among Commission Members followed regarding whether there was sufficient evidence, or the suggestion that such evidence might exist, that such directed solicitation activities had in fact been undertaken by the Christian Coalition, with Mrs. Nelson and Mrs. Cronkhite stating their belief that the information contained in the enclosures to Ms. Young's letter sufficiently suggested that a further investigation by the Commission into whether these types of solicitation activities had occurred was warranted, and that dismissal of the complaint at this point was premature. There was no disagreement among all Commission Members regarding Mr. Mackenzie's analysis of the type of fundraising activities that would be necessary to trigger the PAC registration requirements pursuant to 21-A MRSA section 1052(5)(A)(4).

Attorney Peard interjected that, while she did not have any evidence of direct solicitation by the Coalition in hand, she thought it curious that the National Christian Coalition had pledged \$5,000 (citing page 4, item 2 of the Young materials), thereby suggesting some evidence of some money received by the Christian Coalition of Maine. She also cited other examples at page 9, item 7 to substantiate the good faith basis for her complaint.

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Counsel Gardiner directed the Commission's attention to the context of the instant question before the Commission, provided by 21-A MRSA section 1003, as whether further investigation is warranted.

Attorney Bopp urged the Commission, if it did not believe it had sufficient information one way or another, to exercise its discretion to conclude the matter. He stated that to investigate would impose an incredible burden on the Christian Coalition and that the Commission would then have an obligation to investigate all organizations. The assumption should not be that people are "guilty" in the absence of credible evidence; but, rather, that an investigation is not warranted without credible evidence, not just the suggestion of evidence as in this case.

During the Commission's discussion of the motion, Mr. Mackenzie stated his view that there had been no violation of 21-A MRSA section 1052(5)(A)(4) because there was no direct evidence in the record that the Coalition undertook or participated in solicitation appeals directed solely at the issue of the "people's veto" and in which the Christian Coalition was seeking to raise, and did indeed raise, dedicated, earmarked monies to be used exclusively as contributions to one or more PACs involved in making expenditures regarding the "people's veto" vote.

Upon motion by Mr. Mackenzie and second by Judge Henry, and by a vote of 3-2 (with Mrs. Nelson and Mrs. Cronkhite opposed), the motion carried. Based on that vote, the Commission did not discuss or decide several other issues raised by counsel to the Christian Coalition, including the meaning and implications of the word "spend" in 21-A MRSA section 1052(5)(A)(4), and whether requiring the Coalition to register as a PAC would violate the U.S. Constitution.

Returning to the issues related to the Christian Civic League of Maine, Mr. Mackenzie then inquired of Attorney Whiting regarding what he believed to be "de minimis" about the so-called "slip ups" to which Attorney Whiting had referred in both his correspondence and his oral presentation, inquiring further when such "de minimis slip ups" cross the line thereby triggering the registration and reporting requirements of the statute. Attorney Whiting responded that he believed there had been less than one-half dozen individual contributions in each of the two referenda compared to between 500-1,000 solicitations, less than 1% of the solicitations, which he characterized as "de minimis." Mr. Mackenzie asked whether Attorney Whiting meant "de minimis" to apply to the number of individual contributions or the amount of money, to which Attorney Whiting responded that the amount of money involved was less than 0.2% of the total budget (\$6,000 versus \$300,000), and that the percentage is so small (whether in number or dollar amounts) as to be "de minimis."

Attorney Scott then addressed the Commission on behalf of the Maine Civil Liberties Union. He stated that, while he agreed that the Commission has no power to declare a statute unconstitutional, it does have the duty to save the statute by interpreting it in such a way as to be read constitutionally; suggesting, further, that it may not be possible to so interpret the statute in

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this instance. Regarding the First Amendment right of contributors to participate in core political speech anonymously, that right to contribute anonymously should be upheld by the Commission. If that means that there may be gaping loopholes in the statute, then contributors have that right.

Regarding subparagraph 4 of section 1052(5)(A), Attorney Scott urged that it must be narrowed by limiting its application to include both the solicitation and use of that money on stated purposes. Optionally, the Commission by rule could provide that in order to qualify as a PAC under subparagraph 4, an organization must spend more than \$1,500 other than by contribution to a PAC.

Attorney Kreisman addressed the Commission on behalf of the Family Planning Association of Maine. He cited as core issues the need for clarity in the interpretation of the statutory provisions at issue here, and the desirability of protecting the anonymity of contributors who have been harassed, threatened, etc. by opponents of particular political positions. He suggested that a solicitation that is not for a single purpose and specifically earmarked as a "direct purpose" solicitation would not result in the qualification of the soliciting organization as a PAC under subparagraph 4. If the solicitation is not for a single purpose or not specifically earmarked, then the PAC registration and reporting requirements would not be invoked.

Regarding the subparagraph 2 reference to a "person who serves as a funding and transfer mechanism," he would not read a "de minimis" exception into that qualification and has advised clients not to do what the Christian Civic League has acknowledged having done in this case.

Regarding the "other than by contribution to a political action committee" exception in subparagraph 3 of the section, Attorney Kreisman noted that a qualifying petition becomes effective when certified by the Secretary of State's office. He questioned the applicability of the statute to preliminary activities before the political question is certified as a ballot question. In other words, when does the exception in subparagraph 3 become effective, noting that all kinds of activities occur on both sides of an issue before the question is formally certified.

Chairman Webster noted the action taken by the Commission to dismiss the complaint against the Christian Coalition of Maine, and that the Commission has limited authority with respect to the interpretation of statutes.

Attorney Peard summarized her understanding of the result of that action that if an organization does not engage in direct fundraising for an earmarked purpose, then it is not a PAC.

Judge Henry noted that while she believed the Commission's decision regarding Christian Coalition of Maine had been correct, she was concerned about the so-called "slip ups" of the Christian Civic League.

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Mr. Mackenzie then moved, Mrs. Nelson seconded, and the Commission voted unanimously to table the remaining matter involving the Christian Civic League until the April meeting in order to give the Commission staff and counsel an opportunity to research further the issues of the application of a "de minimis" standard and the "major purpose test" to the facts of this case.

Agenda Item #5: Request for Advisory Opinion by State Senator Bruce W. MacKinnon: After review of applicable correspondence and statutory provisions, Mrs. Nelson moved, Mr. Mackenzie seconded, and the Commission voted unanimously that Senator MacKinnon would have a conflict of interest if he participated in the legislative matter addressed by his letter of February 28, 1999.

Agenda Item #1: Approval of Minutes of February 10, 1999 Meeting: Mr. Mackenzie moved, Mrs. Nelson seconded, and the Commission voted unanimously to approve the minutes of the February 10, 1999 meeting as presented.

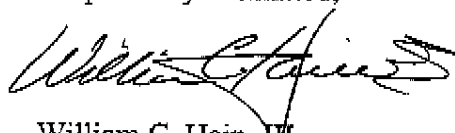
Agenda Item #2: Letter to Governor King Regarding Commission Appointees for 1999: Members discussed the draft prepared for their consideration, recommending revision of paragraphs 4 and 5 to delete the reference to the Joint Standing Committee's concern for lack of geographic diversity on the Commission. After discussion, the Commission authorized Mr. Hain to make the stated revisions and forward the letter on behalf of the Commission.

Agenda Item #6: Status of Legislation: Mr. Hain advised that he would make this presentation at the April meeting, to which the Commission did not object.

Agenda Item #7: Executive Session: At 12:30 p.m., the Commission unanimously voted to go into Executive Session for the purpose of receiving a report on the status of pending lawsuits against the Commission from Commission Counsel Gardiner. At 12:35 p.m., Mr. Mackenzie moved, Mrs. Cronkhite seconded, and the Commission unanimously voted to go out of Executive Session. No action of the Commission in Executive Session required ratification.

On motion and unanimous agreement, the Commission adjourned at 12:40 a.m.

Respectfully submitted,



William C. Hain, III
Executive Director